No. 90-1390

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION,
Petitioner,
v.
EVERT ROMEIN, *et al.*,
Respondents.

FORD MOTOR COMPANY,
Petitioner,
v.
ARTURO GONZALEZ, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Michigan

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether the Due Process Clause of the United States Constitution prevents a State from permitting its legislature, in response to an unexpected state judicial decision, to enact retroactive amendatory legislation for the purposes of (1) restoring recently unsettled expectations; (2) promoting stability, certainty, and confidence in government's willingness to honor its prior commitments; and (3) requiring disgorgement of windfall gains.

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Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379	8, 16
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Greenblatt, *Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540 (1956)	11, 24
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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal public officials and governments throughout the United States. *Amici* have a strong interest in safeguarding the integrity of the internal governance decisions by which States structure their policy-making processes, particularly the process by which state legislatures respond to statutory decisions of state courts.[1]

STATEMENT

In 1985, the Michigan Supreme Court, interpreting 1981 amendments to the State's Workers' Disability Compensation Act, concluded that the legislature had reduced the benefits owing to workers injured *before* passage of those amendments. *Franks v. White Pine Copper Div.*, 375 N.W.2d 715 (1985) [decided together with *Chambers v. General Motors Corp.* and hereinafter cited as *Chambers*] (interpreting Mich. Comp. Law. § 418.354 (1991), "the 1981 Amendments"). This construction of the 1981 Amendments had a particularly devastating effect on elderly retirees whose workers' compensation benefits were their principal source of income.[2] Retirees who regularly had been receiving fixed weekly compensation benefits for many years suddenly found those benefits drastically reduced; in many cases, including those of

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

[2] The *Chambers* decision marked the first instance in the state's history of such retroactive reductions in workers' compensation benefits to injured employees.

respondents Romein and Gonzalez, compensation benefits were eliminated altogether.

Prior to the 1985 *Chambers* decision, every administrative tribunal and lower court to consider the question had concluded that the 1981 Amendments had not been intended to have this draconian retroactive effect. Resp. Br. at 5. The *Chambers* court acknowledged that its interpretation was "inconsistent with the legislative objective" of the Workers' Compensation Act, but felt bound not "to substitute our view regarding the equities" for what it considered the plain meaning of the 1981 Amendments. 375 N.W.2d at 727. Later in 1985, Justice Boyle (the author of *Chambers*) dissented from the denial of rehearing, concluding that the court had erred and that the decision had had "harsh and unforeseen consequences." *Chambers v. General Motors Corp.*, 389 N.W.2d 685 (1985) (denying rehearing). In the case now before this Court, the Michigan Supreme Court, based on its knowledge of local conditions, recognized that its interpretation in *Chambers* had been "an unexpected circumstance." Pet. App. 17a.

Public and legislative response to this "unexpected circumstance" was immediate. The Governor who had sponsored and signed the 1981 Amendments, the current Governor, the State's Workers' Compensation Director, the Director of the Labor Department, and numerous legislative sponsors of the 1981 Amendments all characterized the *Chambers* decision as a misconstruction of the 1981 Amendments and deplored its unsettling consequences. J.A. 29-33; Resp. Br. at 5 n.6, 8 n.10, 10 & n.13.[3] Within days of the initial decision, legislation was introduced in the Michigan House specifically designed to overturn the *Chambers* result. H.B. 5084; *see also* 2 House Journal 2058 (October 16, 1985); Resp. Br. 8-9. Within one month of the denial of rehearing, on January 29, 1986, this bill passed the House by an 87-14 vote.[4]

[3] Detroit Free Press, Jan. 5, 1986 at 3A; Gov. Blanchard, News From the Office of the Governor 2 (May 6, 1987).

[4] 10 House Journal 135-37 (Jan. 29, 1986).

The bill was then referred to committee in the Senate, where it became enmeshed in efforts to revise other provisions of the Workers' Compensation Act. After the Senate Committee and then the full Senate endorsed a broader package of several significant amendments, and the package emerged from a House and Senate Conference, each Chamber approved a set of reforms that was signed into law on May 14, 1987 ("the 1987 Amendments").[5]

As originally approved in the House, H.B. 5084 was made partially retroactive to the effective date of the original 1981 Amendments. App. to Resp. Br. at 7a-8a. Workers injured after the 1981 Amendments were not to be affected. For workers injured before those Amendments, however, the legislature (like the Michigan Supreme Court) concluded that the outcome in *Chambers* had been unexpected, inconsistent with the policies of Michigan's Workers' Compensation Act, and inequitable. This perceived unfairness was heightened by the fact that, while some of the cost savings from the package of reforms had, at the same time, been passed on to workers in the form of much higher workers' compensation benefit levels, only workers injured *after* the 1981 Amendments were eligible for these increased benefits.[6] To protect what the legislature viewed as the morally significant, settled expectations of retired and elderly workers; to maintain the State's long-standing policy commitment not to reduce benefit payments retroactively; to preserve the integrity of the 1981 Amendments as a whole; and to rectify what the Michigan legislature perceived as an unjustified windfall gain for business from the unexpected *Chambers* decision, the legislature made its rejection of *Chambers* retroactive. As enacted in final form, the 1987

[5] *See* Senate History of Senate Bills 3675 (1987); History of Senate Bills in the House 5984 (1987). The Senate vote was 35-1; the House vote was 95-0. For citation to the full legislative history, *see* Resp. Br. at 8-9 & n.11.

[6] 1980 Mich. Pub. Acts 357 § 1; Mich. Comp. Laws § 418.351; Mich. Comp. Laws § 418.355.

Amendments thus precisely tracked the partial retroactivity provisions first adopted—in the immediate aftermath of *Chambers*—in H.B. 5084.

For other pertinent facts, *amici* adopt respondents' statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief will address only the retroactivity challenges arising under the Due Process Clause. We agree with respondents that statutorily-mandated workers' compensation benefit levels are not the sort of "private agreements" to which the Contract Clause applies. *See* Resp. Br. Section I.[7] The Michigan statute presents a question of retroactive legislation—nothing more. More specifically, the central question this case poses is the legitimate extent of a State's power to give its legislature final say in the process of interpreting regulatory statutes.

1. Within a system of generally prospective laws, retroactive lawmaking power can, at times, be a necessary supplement. This Court and many others have endorsed the legitimacy of that supplemental power when Congress and state legislatures retroactively reverse the outcomes of judicial decisions interpreting regulatory statutes. In the circumstances presented here, courts have recognized that such legislative action can affirmatively promote the certainty, stability, and fairness central to the rule of law.

2. The choice of a state legislature to overturn a decision of its own courts raises special constitutional

[7] We also agree with respondents that, even if in some instances statutory benefits can somehow be viewed as incorporated into private agreements, the present case is not one in which the 1981 Amendments may be given such an effect. First, the courts of the concerned state, whose decisions on such questions have consistently been given deference by this Court, have concluded that no contractual interest was created by those amendments. In addition, the statutory provision that is challenged here only *restored* the benefit level to which respondents, who were injured prior to 1981, were entitled at the time the 1981 Amendments were enacted.

considerations that require federal courts to be wary of intervening. As a structural mater, States are free to allocate power between their courts and legislatures in whatever way they see fit. Not only are federal separation-of-powers principles inapplicable at the state level; the Constitution *affirmatively guarantees* to the States the right to structure their internal governmental arrangements free of federal control. Thus, if States choose to give their legislatures the last word on the meaning of public programs—even beyond what might be constitutionally permitted to Congress—the Federal Constitution does not constrain that choice. Indeed, the choice itself is constitutionally protected. Because the Michigan Supreme Court in this case, as in past decisions, found its legislature's actions consistent with the allocation of state lawmaking authority, this Court must respect that decision.

Similarly, that the unsettling event triggering a need for legislative action was a judicial decision, as opposed to some other change in circumstance, does not raise any distinct constitutional barriers. The *extent* to which a judicial decision departs from widely shared understandings and practices, or resolves genuine uncertainty, may be relevant in determining the firmness of the foundation for the legislature's action, or the substantiality of the countervailing equities. But even a judicial decision that may be fairly characterized as "foreordained," and obviously "correct," poses no ineluctable barrier to retroactive action.

3. Against this background, the Michigan legislation is fully consistent with established retroactivity doctrine. The ends for which the statute was enacted include (1) restoring recently unsettled expectation and reliance interests; (2) promoting stability, certainty, and confidence in government's willingness to honor its commitments; (3) "curing" a problem arising in the administration of an ongoing public program; (4) responding to a significant change in circumstance, specifically an unexpected

judicial decision; and (5) requiring the disgorgement of windfall gains. For retroactive and other legislation, these are clearly recognized legitimate public purposes.

In addition, the means chosen by the legislature—retroactive lawmaking—is both directly related to the legislature's objectives and constitutionally valid. In some circumstances, retroactive state legislation might be so harsh and arbitrary as to raise substantive due process questions. Thus, such circumstances might exist when retroactive legislation is used to target identifiable individuals or to single out especially vulnerable groups; when the adverse effects of retroactivity are intensified by extreme legislative delays; when interests resting on "substantial equity" are undermined; or when the retroactive legislation comes as a sharp surprise to settled and justifiable expectations—particularly if the disadvantaged party could have altered its conduct in advance to avoid the liabilities being retroactively imposed.

But none of these circumstances is suggested by this case. The businesses burdened here cannot be considered to be especially vulnerable to unfair legislative treatment or consideration. Moreover, the legislative response to the *Chambers* decision was swift in its initiation and not unduly delayed in its completion. Thus the legislature's action involved no surprise at all, let alone one that could be found unfair; the only genuine element of surprise in this case was that caused to employee expectations by the *Chambers* decision. For these reasons, petitioners also cannot claim interference with any interests resting on "substantial equity." And in any event, the obligations imposed by the State under its workers' compensation laws could not have been avoided by the petitioners even if those obligations had been entirely prospective in nature.

ARGUMENT

I. THEORY, WELL-ESTABLISHED LEGISLATIVE PRACTICE, AND JUDICIAL PRECEDENT SUPPORT LEGISLATIVE POWER TO REJECT RETROACTIVELY JUDICIAL INTERPRETATIONS OF REGULATORY STATUTES

Both Congress and the legislatures of the States have long found it necessary to legislate retroactively at times.[8] And as Justice Scalia has observed, "retroactive legislation . . . has long been upheld against constitutional attack where reasonable." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring).

The basis for retroactive policymaking in a context like that presented here has perhaps been most effectively stated by Professor Lon Fuller. As he noted, within a system of generally forward-looking laws, retroactive legislation may on occasion be necessary in order to preserve values central to the rule of law—ensuring stability, protecting legitimate expectations, and promoting certainty and reliability:

> A system of law composed exclusively of retroactive rules could exist only as a grotesque conceit worthy of Lewis Carroll or Franz Kafka. Yet a retroactive 'curative' statute can perform a useful function in dealing with mishaps that may occur within a system of rules that are generally prospective. . . . retrospective law-making can in some instances actually serve the cause of legality. . . . it can serve to heal infringements of the principle that like cases should receive like treatment. L. Fuller, *The Morality of Law* 74, 211 (2d ed. 1969).

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[8] Retroactive legislation is here defined to embrace laws that "attach new rights and duties to already completed transactions." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960), *quoted in* Pet. Br. at 33-34.

In this case, the Michigan Supreme Court issued a decision in *Chambers* that, by its own acknowledgement, the Michigan legislature's judgment, and all available external evidence, was "unexpected." The effect of that decision—"harsh and unforseen" in the words of its judicial author—was the retroactive reduction of compensation benefits to previously injured workers. Those affected were the first in the State's history to find that their expectations of regular receipt of fixed benefits had been defeated. In restoring these benefits, and vindicating those expectations, the Michigan legislature sought to assure that the affected workers were treated no less equitably than others who had been injured in the past.

In the modern regulatory state, judicial decisions interpreting ongoing regulatory programs often have policy consequences far beyond their effects on the parties before the court.[9] On many such occasions, Congress and state legislatures have found it appropriate to reject those consequences and retroactively alter the outcomes judicial decisions have wrought. And in circumstances virtually identical to those here, courts consistently have upheld such actions.[10]

A. Congress

The famous "Portal-to-Portal" cases, which petitioners do not cite, are directly on point. *See, e.g., Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir.), *cert. denied*,

[9] The *Chambers* decision appears to affect as many as 40,000 workers, may redistribute nearly $80 million from injured workers to businesses, and changes long-standing public policies regarding the stability of established compensation benefits. *See, e.g.*, Detroit Free Press, Jan. 5, 1986 at 3A; *id.*, Nov. 3, 1985 at H1.

[10] *See generally* Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 Am. B. Found. Res. J. 379, 447 ("Curative laws, although commonly labeled retroactive because of their alteration of the pre-enactment status of an act, are nearly always sustained by the courts."); Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 468 (1982); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 217 (1960).

335 U.S. 887 (1948); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948). In 1938, Congress enacted the Fair Labor Standards Act ("FLSA"),[11] which required specific wage compensation rates for overtime work and provided liquidated damages as sanctions. Contrary to customary understandings in many industries, this Court, in a line of decisions culminating in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), held that the Act included employees' transportation, preparation, waiting time, and the like ("portal-to-portal time") within the statutory definition of "work." The decision subjected employers to potentially substantial liabilities, and one year later, Congress responded by enacting the Portal-to-Portal Act,[12] extinguishing—retroactively to the date of the original FLSA—any right of employees to recover under the *Anderson* ruling.[13]

This action was subjected to the same due process challenge advanced here. Employees argued that "the provisions of the [FLSA] statute must be read into the contract of employment and that the right to recover compensation in accordance with its terms accrues upon the rendering of services." *Seese*, 168 F.2d at 64-65. They also asserted that the decision in *Anderson* had generated "vested rights" in this Court's interpretation. But Judge Learned Hand expressed the universal judicial response: "I agree that that right was 'vested' in every sense of that word. However, it is another matter whether the uncertainty that had prevailed and the unexpectedness of the new liabilities were irrelevant upon whether the Act was constitutional." *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 97 (2d Cir.) (Hand, J., concurring), *cert. denied*, 346 U.S. 877 (1953). At least seven court

[11] 52 Stat. 1060-1069 (1938) (as codified at 29 U.S.C. § 201 et seq. (1989)).

[12] 61 Stat. 84-90 (as codified at 29 U.S.C. § 251 et seq. (1989)).

[13] As the Michigan legislature did here, Congress excepted individual cases that had been reduced to a final judgment before enactment of the Portal-to-Portal Act. *Seese*, 168 F.2d at 62.

of appeals decisions, 42 reported district court decisions, and 81 unreported ones held that the Constitution did not preclude Congress from retroactively overturning this Court's decision. After surveying these decisions, one court of appeals said: "[E]very decision has upheld the constitutionality of the statute. This unanimity of result represents as accurate an expression of the views of the federal judiciary as it is possible to obtain." *Thomas v. Carnegie-Illinois Steel Corp.*, 174 F.2d 711, 713 (3d Cir. 1949).[14]

Two facets of the Portal-to-Portal controversy are particularly relevant here. First, Congress characterized this Court's decision in *Anderson* as "unexpected," *see Battaglia*, 169 F.2d at 259-60 n.11, and the courts accepted that characterization, *see, e.g., Seese*, 168 F.2d at 64. Second, Congress concluded that the Court's interpretation had generated an unjustified windfall gain for employees, *see Battaglia*, 169 F.2d at 259-60 n.11, and the courts also accepted that policy judgment. *Seese*, 168 F.2d at 64. The basic principle of these decisions is that "[a] retroactive statute, by remedying an unexpected judicial decision, may actually effectuate" important expectations. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960). In such circumstances, retroactive reversal is not constitutionally problematic.[15]

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[14] This Court consistently denied certiorari. In *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 795, *modifying* 331 U.S. 199 (1947), after the Court initially affirmed a judgment for overtime pay, but before the time for rehearing had run, Congress enacted the Portal-to-Portal Act. On rehearing, this Court vacated and remanded for reconsideration under the new law, and on remand, the employers prevailed. *Asselta v. 149 Madison Ave. Corp.*, 79 F. Supp. 413 (S.D.N.Y. 1948) and later proceeding *Asselta v. 149 Madison Ave. Corp.*, 90 F. Supp. 442 (S.D.N.Y. 1950).

[15] As Professors Henry Hart and Albert Sacks rhetorically ask: "Would it be fair to say that, in principle, it was the *Mt. Clemens* line of decisions rather than the statute which was actually open to objection on the score of retroactivity?" H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 647 (Tent. ed. 1958). *See also* Greenblatt, *Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 556 (1956).

In *Battaglia*, General Motors successfully argued that the Constitution *does not* prevent Congress from going back nine years in retroactively depriving employees of the unexpected benefits of a recent Supreme Court decision. Today, General Motors urges that the Constitution *does* prevent a legislature from retroactively going back five years to deprive employers of *their* unexpected gains from a recent Michigan Supreme Court decision. If anything, the circumstances here more strongly support the legislature's actions; while the FLSA was the first federal statute regulating wages, the 1981 Workers' Compensation Amendments were enacted against a longstanding state practice of not reducing benefit levels retroactively.[16]

In *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), the United States Claims Court had held that the Department of the Treasury did not have statutory authority to impose a fee on awards issued by the Iran-United States Claims Tribunal; Congress swiftly granted that authority and made its statutory grant retroactive for three years, back to the date Treasury had first acted. This Court unanimously upheld the statute. Similarly, when a district court held certain commercial notes issued by local

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[16] For another example of congressional action giving retroactive effect to its rejection of a decision of this Court, *see* the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified as amended at 20 U.S.C. 1415(e)(4) (Supp. IV 1986)). In that Act, Congress specifically overturned this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), by permitting the award of attorney's fees in circumstances *Smith* had held precluded under earlier legislation. Congress made its policy choice retroactive to the day before *Smith* had been decided, more than two years earlier. *Counsel v. Dow*, 849 F.2d 731, 738-39 (2d Cir. 1988), *cert. denied*, 488 U.S. 955 (1989). Upholding this retroactive overturning, the Second Circuit noted: " 'Curative' legislation such as this, which is designed to cure what *Congress perceived* as a defect in prior law, is entitled to particular deference." *Id.* (emphasis added). At least two district courts have reached the same conclusion, *id.* at 739; no court appears to have reached a contrary result.

governments not subject to estate taxes, and Congress retroactively overturned that decision,[17] the Solicitor General defended the statute on the ground that it was "designed simply to avoid giving taxpayers a windfall benefit as a result of a judicial decision that postulated (we believe erroneously) a previously unrecognized estate tax exemption." Jurisdictional Statement at 12-13, *United States v. Crocker National Bank*, 481 U.S. 1047 (1987) (No. 86-1521).[18]

Earlier in the century, this Court established the principles on which these legislative actions rest. A judicial decision about the meaning of a statutory policy creates no general bar to a legislative decision reaching a contrary policy conclusion and applying that conclusion retroactively. *See, e.g., Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1936); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *United States v. Heinszen & Co.*, 206 U.S. 370 (1907). Although a statute overturning a final judgment that is *res judicata* between specific parties might present a more difficult question,[19] even such actions have been sustained, as in the classic decision in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (legislature set aside probate court decree and ordered new hearing). *See also Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940) (five years after final administrative judgment, and long after time for judicial review had passed, Congress ordered new compensation hearing).

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[17] *Haffner v. United States*, 585 F. Supp. 354 (N.D. Ill. 1984), *modified*, 757 F.2d 920 (7th Cir. 1985), the result of which was overturned by Section 641(a) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 939.

[18] This Court found that the original statute had not exempted the notes, thus obviating any constitutional challenge to the subsequent statute. *United States v. Wells Fargo Bank*, 485 U.S. 351 (1988).

[19] In the present case, such final judgments were specifically exempted from the reach of the Michigan statute.

B. State Legislatures

Like congressional legislation, retroactive state policymaking has at times been prompted by judicial decisions interpreting statutes. And like the federal courts, state courts typically have upheld such legislation.[20] State legislatures have a substantial interest in the occasional use of this technique in order to retain ultimate control over ongoing regulatory programs.

This Court has had less occasion to review state legislation responding to state court decisions. But in *Van Emmerik v. Janklow*, 454 U.S. 1131 (1982), the Court concluded that a state court's rejection of a challenge to such legislation did not present a substantial federal question. Significantly, the State's justifications for retroactivity in *Van Emmerik* were less weighty than in the present case, and the burdens imposed substantially greater.

In *Van Emmerik*, the South Dakota statute under attack responded not to the legitimate expectations of elderly retirees but to a judicial decision holding that the proper sales tax rate on utility services was three percent, rather than the four percent imposed by the general sales tax. Although no well-entrenched state policy indicated that the general sales tax rate and that for utility services should be the same, the South Dakota legislature retroactively fixed a four percent rate reaching back 11 years. This Court sustained the South Dakota Supreme Court's conclusion that the act did not violate any constitutional prohibitions.

The broad range of retroactive policymaking (and precedent sustaining it) indicates not only the degree of disruption that would be caused by increased constitutional

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[20] *See, e.g., Laubie v. Sonesta Int'l Hotel Corp.*, 752 F.2d 165 (5th Cir. 1985); *Priest v. Canada Life Assur. Co.*, 446 N.W.2d 352 (Mich. App. 1989); *Sanelli v. Glenview State Bank*, 483 N.E.2d 226 (Ill. 1985) (and cases cited therein); *Schwarzkopf v. Sac County Bd. of Supervisors*, 341 N.W.2d 1 (Iowa 1983) (and cases cited therein).

constraints on retroactivity, but the extent to which the kind of retroactivity involved here is widely regarded as appropriate and fair. In part because of the frequency of such retroactive policymaking, petitioners bear a heavy burden of proving that the effect of this state statute is so arbitrary, unfair, and irrational that it violates their constitutional rights. *See National R.R. Passenger Corp. v. Atchison, T., & S. F. R.R.*, 470 U.S. 451, 472 (1985).

Petitioners acknowledge only parts of this overwhelming array of case law. Seeking to meet their burden of proof, they distinguish the small sample of cases they cite, arguing that there are two radically different *kinds* of legislative action overturning judicial decisions. Pet. Br. at 38-44. The first are cases said to implicate only "curative" reversal of judicial decisions; the second are said instead to entail a "reversal" of legislative policy. Not surprisingly, petitioners assert that all the adverse decisions they acknowledge fall in the first category, while the instant case—allegedly standing alone in the case law—falls into the second. Such a distinction is of doubtful value,[21] and whatever its utility may be in other contexts, it is of no avail here.

First, when a legislature overturns a judicial construction of a statute, the suggested distinction is largely without substance. Beyond recitation of these labels, petitioners offer no helpful analysis, capable of being judicially applied, to distinguish between legislative reversals that merely "cure" statutory problems and those that are "true reversals." In all these cases, legislatures respond to a judicial decision, typically regarded as erroneous, that is said to require remedial or curative legislation. Taking petitioners' suggested line seriously would require courts to second-guess legislative judgments about the necessity for legislative action.

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[21] The only decision of this Court in which the distinction appears even arguably to have contributed to the invalidation of a state legislative act is *Forbes Pioneer Boat Line v. Board of Commrs.*, 258 U.S. 338 (1922), discussed *infra* Section III.C and note 28.

Second, nothing distinguishes this case from those cited—including the Portal-to-Portal decisions and *Van Emmerik*—in which legislatures overturned other judicial decisions; if those cases are explained as "curative," the "curative" category must be applied here as well. Indeed, commentators have recognized as "curative" any legislation that simply overturns a statutory interpretation. *See, e.g.*, Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 468 (1982) ("[C]urative acts are statutes that retroactively adjust existing legislation to conform to the putative intent of the legislature . . . [T]hey are routinely upheld.").

Third, in every case of this sort, those disadvantaged by retroactive legislation claim a "sudden reversal" of policy. In *Heinszen*, for example, businesses complained that Congress, in retroactively authorizing tariffs eight years into the past, had simply enacted a new tariff. This Court said such a claim "begs the question" and "mis-stat[es] the nature of the act of Congress"; the statute "on its very face" had been designed as a response to a specific judicial decision. 206 U.S. at 385-86. Looking to the legislature's asserted purposes and to the context, the Court found that the statute had simply restored expectations that the Court's own decisions had disrupted.

Finally, on the facts of this case, there is no sudden "reversal of policy"; despite their reconstruction of the facts, petitioners cannot carry their burden of rebutting the well-substantiated conclusions of the Michigan Supreme Court and legislature that it was the court's own decision in *Chambers* that was "unexpected."

The labels "curative" and "reversal of policy" are conclusory and distract from genuine analysis. They are vestiges of a pre-Realist era in which courts sought to categorize problems in formal terms, rather than directly examining the underlying interests involved. Serious efforts to apply them would intrude on the prerogatives of state legislatures to define the bases for their actions. Instead, the Court has generally looked, and should con-

tinue to look, to the justifications for retroactive state legislation, to the nature of the interests affected, and to the extent of the burden imposed. As the following sections show, based on these concrete concerns, the Michigan legislature's actions fall well within constitutional limits.

II. PRINCIPLES OF FEDERALISM SUPPORT MICHIGAN'S AUTHORITY TO ACT RETROACTIVELY IN THE CIRCUMSTANCES OF THIS CASE

Some critiques of retroactive legislation focus on concern for protecting the judiciary from undue legislative interference, or protecting earlier legislatures from subsequent ones.[22] But as Justice Brennan noted, "we have held the States not bound, as is the Federal Government, by the doctrine of separation of powers." *McGautha v. California*, 402 U.S. 183, 254 n.3 (1971) (Brennan, J., dissenting). As a result, even if retroactive federal legislation might be barred in some circumstance by separation of powers principles, similar state legislation should not, on this ground, be held to violate the Constitution.

Yet, in essence, the allocation of policymaking authority between the branches of state government is ultimately all that is involved in this case. In the courts below, petitioners aggressively challenged the Michigan legislature's actions on *state* separation of powers grounds. The Michigan Supreme Court rejected those arguments, and, as in previous Michigan cases,[23] upheld the power of the legislature to give retroactive effect to a law overturning a statutory interpretation by that State's courts. Under Michigan law, the legislature simply has the final word on the meaning of the statutes it enacts. Arguments about whether that legislature actually honored the intent of the original, enacting legislature, or whether the Michigan Supreme Court's decision was unexpected,

[22] *See, e.g.*, Eule, *supra note* 10.

[23] *Priest v. Canada Life Assur. Co.*, 446 N.W.2d 352 (Mich. App. 1989); *Macomb County Prof. Deputies Ass'n v. Macomb County*, 452 N.W. 2d 902 (Mich. App. 1990).

are therefore ultimately beside the point. Michigan has, in a sense, chosen to give its legislature the option of acting as a court of last resort on questions of statutory construction—at least when general policy consequences are at stake. As Justice Stevens has said, "it is not our business to disagree with the state tribunal's evaluation of the State's own lawmaking process." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 483-84 (1981) (Stevens, J., dissenting).[24] Basic principles of constitutional federalism protect the choice Michigan has made. *See generally Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2400 (1991).

"Rights under [the Fourteenth] amendment turn on the power of the State, no matter by what organ it acts." *Missouri v. Dockery*, 191 U.S. 165, 170-71 (1903) (Holmes, J.). Of course, the Michigan legislature originally could have made quite explicit its decision to apply the 1981 Amendments only to workers injured after those Amendments took effect. Similarly, the Michigan courts could have interpreted the Amendments as having only prospective effect and hence as applicable only to such workers. Had the Michigan legislature intervened to clarify the 1981 Amendments before any court had construed them, it is hard to see any constitutional barrier that would have stood in the way. Had the legislature instead stepped in after a lower state court had interpreted the statute, while that decision could still have been reversed in a higher state court, a "retroactive" legislative clarification would surely not raise any constitutional problems. *See, e.g., Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Goddard v. Frazier*, 156 F.2d 938 (10th

[24] *See also id.* at 461 n.6 (majority opinion) ("the States are free to allocate the lawmaking function to whatever branch of the state government they may choose"); *Uphaus v. Wyman*, 360 U.S. 72, 77 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 256-57 (1957) (Frankfurther, J., concurring in result); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) (Cardozo, J.) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

Cir.), *cert. denied*, 329 U.S. 765 (1946). If the State's highest court had rejected prior judicial interpretations, its decision would have had precisely the same retroactive effect as the legislation at issue here, and yet no constitutional issues would be raised. Finally, as occurred here, the legislature could intervene after interpretation of the statute by the State's highest court. Viewed from the perspective of the federal Constitution, this last situation is no different from the others. Whether a state legislature chooses to act before any judicial decision, after a lower court decision, or after a highest court decision, is purely a question of legislative judgment and the internal allocation of state policymaking authority. At least in the absence of some extraordinary abuse of power that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), as far as the Constitution is concerned, that is the end of the matter.

"It might seem advantageous to some of the states that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British Parliament. . . . Should such an organization be adopted by a state, whatever might be thought of its wisdom, where beyond the body politic of the state would exist any power to impugn its legitimacy?" *Baltimore & S. R.R. v. Nesbit*, 51 U.S. (10 How.) 395, 400 (1850).[25] Division of authority between courts and legislatures at the state level

[25] The most frequently cited statement of this view is from *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902):

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty."

vary greatly from those the Constitution requires of the national government. Some state courts issue advisory opinions; participate directly in making political appointments; issue final rules of practice not subject to legislative validation; have a more unconstrained policymaking role through relaxed standing requirements or the power to issue prospective decisions beyond whatever limits Article III might impose; or serve in administrative capacities not available to the federal courts. *See, e.g., Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908) ("[W]hen, as here, a state constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder so far as the Constitution of the United States is concerned"). Ever since *Calder v. Bull*, this Court has recognized that state legislatures may similarly play a more direct, quasi-judicial role vis-a-vis their state courts than is permitted to Congress under separation-of-powers principles. "There is nothing in the constitution of the United States which forbids the legislature of a state to exercise judicial functions." *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829). *See generally*, 3 J. Story, *Commentaries on the Constitution*, § 1392, at 266-67 (1833) (same).

The limited nature of the quasi-judicial role implicated here must be stressed. Thus, this is not a case in which a state legislature is upsetting a final judgment that is *res judicata* on the rights and liabilities of specific parties.[26] Indeed, adjudicated controversies between specific litigants are explicitly exempted from the reach of the 1987 Amendments. The legislature's concern was rather with the thousands of other individuals, not parties to the case, who were affected by the state court's ruling, and with the broad policy consequences of that ruling for an ongoing regulatory program. If it is necessary to draw a sharp line between legislative and judicial functions (and for the States it assuredly is not), this legislature

[26] Even if it were, the statute might still be valid. *See Fleming v. Rhodes*, 331 U.S. 100 (1947) (upholding retroactive legislation overturning final judgments).

has thus left to the courts the quintessential judicial function of resolving individual disputes; the Michigan legislature has addressed only the consequences of such resolutions for disputes not yet adjudicated. This focus, especially in matters of this magnitude, would seem to go to the heart of the legislative role.

In general, legislatures are no more disabled from responding to changed circumstances triggered by judicial decisions than by other acts. Judicial decisions do not differ in kind from other events that might disrupt settled expectations, constitute unexpected changes in circumstances, or produce unbargained-for windfall gains. The *extent* to which a judicial decision departs from widely shared understandings and practices, or resolves genuine uncertainty, may be relevant in determining the firmness of the foundation for legislative action, or the substantiality of the countervailing equities. But the substantial body of precedent on this practice, *see* Section I, shows that in cases involving legislative reversal of judicial decisions, courts examine these specific considerations just as they do in any other circumstance prompting retroactive legislation.

As we explained above, in the many cases upholding legislative reversals of judicial decisions, this Court and others have consistently considered the extent to which the decisions in question disrupted settled expectations or produced windfall gains.[27] And on questions such as these —which go to how necessary legislation is perceived to be—courts historically have deferred to legislative judgments. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). That the state courts are best positioned to characterize the local circumstances and purposes leading to state legislation further structures

[27] *See* Section I. In such analogous contexts as the availability of a remedy in habeas corpus, or in damages, for constitutional violations, the Court has looked to the "newness," or unpredictability, of the decision relied upon by the person alleging a constitutional wrong. *See generally* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731 (1991).

and constrains this Court's review. *See, e.g., North Carolina v. Butler*, 441 U.S. 369, 376 n.7 (1979); *Ward v. Illinois*, 431 U.S. 767, 772 (1977); *see also Employment Div. v. Smith* 485 U.S. 660, 676-77 (1988) (Brennan, J., dissenting). Inquiry into whether a judicial decision was in fact a change in circumstance justifying retroactive legislation thus poses no special constitutional problems.

In addition, even a judicial decision that can be characterized as "foreordained" and obviously "correct" does not present an ineluctable barrier to legislative reversal. The relevant question is not whether legislation is retroactive with respect to a judicial decision or some other event, but whether, in context, the burdens imposed are so harsh, and the legislature's reasons for acting so arbitrary, as to constitute a denial of due process. Reversal of a judicial decision, in and of itself, is not *per se* so offensive to basic notions of fairness that it is constitutionally barred. *See, e.g., Fleming* (upholding retroactive reversal of even final judgments).

Federal administrative agencies, which at times combine adjudicatory and policymaking roles, have the power to adopt retroactive policies. *See, e.g., Leedom v. International Bhd. of Elec. Workers*, 278 F.2d 237 (D.C. Cir. 1960). More significantly, federal agencies have the power to respond to judicial decisions interpreting their governing statutes with retroactive policy changes. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 620 (1943). To deny at least this much power to state legislatures, responding to the interpretation of state regulatory programs by state courts, would make federalism an empty guarantee.[28]

[28] That principles of federalism support Michigan's authority to act as it did is underscored by the Framers' specific rejection of a proposed prohibition of retroactive state legislation. A proposal by Edward Rutledge—to add a ban on "retrospective laws" to the other specific prohibitions on state action—was deleted from the Convention draft by the Committee on Style. *See* 2 *Records of the Federal Convention of 1787* 440, 597 (Farrand ed. 1937). And

III. NONE OF THE CIRCUMSTANCES THAT MIGHT APPROPRIATELY LIMIT THE SCOPE OF RETROACTIVE LEGISLATION IS PRESENT HERE

No dispute can exist as to the legitimacy of the *ends* for which the Michigan legislature acted. Those ends

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consistently with this decision, this Court frequently held, during the first half of the Nineteenth Century, that the Constitution did not preclude retroactive state civil laws. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) at 397 (Patterson J.) ("I had an ardent desire to have extended the provision in the constitution to retrospective laws in general."); *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456 (1854); *Baltimore & S. R.R.*, 51 U.S. (10 How.) at 401 ("That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day."); *Watson v. Mercer*, 33 U.S. (8 Peters) 88, 110 (1834) ("it is clear that this court has no right to pronounce an act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the state from passing retrospective laws generally; but only ex post facto laws."). Moreover, Justice Story, in the sentence of his treatise immediately following the one quoted by petitioner, Pet. Br. at 38, said that notwithstanding objections to retroactive laws, such laws are nonetheless "left open to the States, according to their own constitutions of government." 2 J. Story, *Commentaries on the Constitution* 272 (5th ed. 1891). *See* also 3 J. Story, *Commentaries on the Constitution* 266 (1833) (same).

Nor is there anything in the text or history of the fourteenth amendment to suggest that its adoption operated to limit the existing powers of the States in this respect. As the Court stated in *League v. Texas*, 184 U.S. 156, 161 (1902), the Amendment "contains no prohibition of retroactive legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the Federal Constitution." *See also Orr v. Gilman*, 183 U.S. 278, 286 (1901) (reaffirming *Carpenter, supra*). Thus, in the Fifth Edition of Justice Story's *Commentaries*, published in 1891, the passage quoted above appears unchanged. 2 J. Story, *Commentaries on the Constitution* 272 (5th ed. 1891).

To be sure, at the height of the era in which economic interests were held to be protected by notions of substantive due process, there are several suggestions in the Court's opinions that the fourteenth amendment prohibits retroactive state laws defeating "vested rights." *E.g., Treigle v. Acme Homestead Ass'n*, 297 U.S.

include (1) restoring recently unsettled expectation and reliance interests; (2) promoting stability, certainty, and confidence in government's willingness to honor its commitments; (3) responding to significant, sudden changes in circumstances, including unexpected judicial decisions; (4) requiring disgorgement of windfall gains; and (5) assuring that injured workers and their dependents have sufficient means to avoid falling into poverty and the need for public assistance. The propriety of these purposes, whether in the context of retroactive legislation or elsewhere, is well-established.[29]

The principal question, then, is whether the particular *means* chosen—retroactive policymaking—is so arbitrary and oppressive in the context of this case as to suggest serious substantive due process concerns. In specific circumstances, retroactive legislation might conceivably raise

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189 (1936). But the only decision during this era that appears to rest exclusively on this rationale—and certainly the most recent—is *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922) (holding unconstitutional a state statute seeking to validate retroactively a toll collected from a vessel for passage through a canal). *Forbes* is distinguishable from the present case on many factual grounds, but more notably for present purposes, the Court's four paragraph opinion relies on no American precedent and cites no constitutional text or history to support the result. Whether or not that result is equitable, it provides no support for finding a barrier to retroactive state legislation in the Constitution's text or original understandings. Moreover, in the same year that *Forbes* was decided, this Court declined to extend it "beyond its facts," *Charlotte H. & N. R.R. v. Welles*, 260 U.S. 8, 12 (1922), and it has never since invoked the decision to invalidate any other state statute on retroactivity grounds.

[29] For cases recognizing the legitimacy of these purposes, *see* Section I. On preventing receipt of windfall profits, or requiring their disgorgement, as legitimate public purposes, see *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 n.30 (1977); *El Paso v. Simmons*, 379 U.S. 497, 515 (1965); *Lichter v. United States*, 334 U.S. 742 (1948); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Battaglia*, 169 F.2d at 259-60 n.11; *Seese*, 168 F.2d at 65. *See generally* Hochman, *supra*, at 705; Slawson, *supra*, at 226.

such concerns. Against that possibility, the Court might reserve some outer limitations on the power of state legislatures to overturn decisions of their own courts. The possible limitations that case law and the history of retroactive legislation suggest, however, are not remotely implicated in this case.

A. Political Process Concerns

When legislating retroactively, a legislature may be able to identify with certainty the particular individuals who will be adversely affected. Thus, retroactive legislation can be (and has been) a vehicle to target specific individuals or to single out particularly vulnerable groups for legislatively-imposed disadvantages. *See* Greenblatt, *supra*, at 540; *cf. Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137-38 (1810) (Contracts Clause stemmed from "apprehension [of] violent acts which might grow out of the feelings of the moment").

The type of retroactive statute involved here raises no such question of possible exploitation. It is not targeted at a few employers singled out from the rest, *compare Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), and is as general in its effects as prospective legislation on the subject would be. Moreover, petitioners General Motors and Ford, and business more broadly, can hardly be considered particularly vulnerable groups unlikely to have their interests heard and fairly considered in the Michigan legislature. In general, they are not "politically weak or an easy target for the imposition of costs and hence chosen to bear those costs without fair attention to [their] interests." Note, *A Process-Oriented Approach to the Contracts Clause*, 89 Yale L.J. 1623, 1646-47 (1980). And in this specific case, the Michigan statute was not enacted with "studied indifference", *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935) (Cardozo, J.), to their interests. Business interests participated actively in the legislative process and succeeded in having the legislation as initially proposed transformed into a package of comprehensive reforms of

the compensation system; indeed, among the provisions included in this package as enacted was one that business had long sought and that overruled another decision of the Michigan Supreme Court. *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (Mich. 1986) (holding exclusive remedy provisions of workers' compensation system do not bar actions for intentional torts). The legislation was not enacted hastily, but with full deliberation and attention to business concerns.

B. Extreme Delay

Retroactive legislation that responds to a change in circumstances and seeks to restore the *status quo* might raise concern if not enacted reasonably promptly. But in this case, legislation to overturn *Chambers* was introduced within days of the decision, passed by the House within one month of the court's denial of rehearing, and signed into law a little more than one year later. This is well within the time periods courts have accepted for legislative responses to judicial decisions. Particularly given the need for full legislative deliberation, and the fact that the challenged provision became part of a comprehensive reform of workers' compensation in Michigan, this action was reasonably prompt.

Petitioners obscure the fact that the legislation was a response to a *particular* judicial decision. Rather than recognizing that the statute was designed to overturn the ruling in *Chambers*—a decision rendered only 17 months earlier—they describe the statute as reaching back five years, to the effective date of the original 1981 Amendments. Of course, not until *Chambers* was decided was the legislature faced with the changed circumstance that triggered the need to consider a possible response.

Furthermore, even on petitioners' more expansive measure, the statute does not reach back nearly as far as existing precedent permits. In the Portal-to-Portal cases, *see* Section I.A, Congress acted almost a year after this Court's decision, and on petitioners' measure, the legislation there "reached back" nine years (to the original

Fair Labor Standards Act). More recently, courts have sustained Congress' decision, in validating Treasury Department regulations, to make its action retroactive for four years. *See, e.g., Canisius College v. United States*, 799 F.2d 18 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987). In *Heinszen*, this Court sustained Congress' decision to "reach back" and validate a tariff collected six years earlier. And in *Van Emmerik*, which this Court dismissed for want of a substantial federal question, the state legislature acted within one year of a state supreme court decision, but the response "reached back" 12 years.[30]

It is difficult to know what to make of petitioners' assertion that, apart from "curative" cases, "we are not aware of any decision of any other court affirming the authority of a legislature to reach back beyond the session of its immediate predecessor." Pet. Br., at 41. If, as we believe, the cases just listed *all* involve "curative" legislation, then this case does as well; nothing distinguishes the Portal-to-Portal cases, *Van Emmerik*, and other cases cited in Section I from the situation here. And even if, for reasons we do not perceive, this case involves something radically different from "curative" legislation, numerous other cases (which petitioners do cite for other points[31]) uphold similar legislation in circumstances where legislatures have reached back as far—and in many instances much further—than here. As this well-established body of law makes clear, the Michigan legislature acted with sufficient promptness in overturning the result in *Chambers*.

C. Unfair Surprise and Interferences with Free Choice

Retroactive legislation most offends the values associated with security and stability when its burdens fall as a sudden surprise. Moreover, questions of fairness are intensified if a person would likely have altered his con-

[30] In *Paramino, supra*, Congress acted after new information became available and opened up hearings that had been reduced to final awards more than five years earlier.

[31] Pet. Br. at 39-40.

duct had he known in advance of the duties or liabilities that retroactive legislation subsequently imposes.

The combination of these factors best explains those few cases in this century in which this Court has invalidated retroactive legislation. The gift/estate tax cases, for example,[32] imposed retroactive taxes that, had they been known in advance, might well have caused parties to structure their transactions differently or not to make the gifts in question at all. Some of these cases also involved either the *first* federal gift tax, whose effect on previously completed transactions could well come as a surprise,[33] or, another, wholly new *type* of tax imposed for the first time.[34] In the same vein, *Forbes* involved "the most obviously unjust" retroactive law, a law that sought to impose a fee for a ship's use four years earlier of a particular lock and canal. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Calif. L. Rev. 217, 220 (1960). Had notice of the fee existed in advance, the ship's owners might well have charted a different course.

Neither unfair surprise nor interference with free choice can be ascribed to the statute challenged here. At the time they first took their aggressive litigation posture, petitioners knew that their argument was controversial; that other employers refused to make it; that the legislature had adopted a resolution rejecting it; and that administrative tribunals and lower Michigan courts were rejecting it whenever raised. They knew that, should they prevail in *Chambers*, legislative response was a distinct possibility. Moreover, at no point did they have any reasonable basis for acting as if *Chambers* were the final word; as soon as it was decided, legislation to overturn it was introduced, made retroactive, and quickly adopted

[32] *Helvering v. Helmholz*, 296 U.S. 93 (1935); *Coolidge v. Long*, 282 U.S. 582 (1931); *Untermyer v. Anderson*, 276 U.S. 440 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927), cited in Pet. Br. at 43.

[33] *Untermyer*, 276 U.S. 440.

[34] *Nichols v. Coolidge*, 274 U.S. 531.

in one house of the Michigan legislature. That thorough legislative deliberation took slightly more than one year does not make the final outcome any more of a surprise. "Appellee is hardly in a position to claim surprise at the [amendments] to the minimum tax. The proposed increase in rate had been under public discussion for almost a year before its enactment." *United States v. Darusmont*, 449 U.S. 292, 299 (1980).

Nor can petitioners plausibly claim that they would have altered their conduct had they known in advance that they would have to pay full benefits to workers injured before 1982. First, at the time those workers were injured, Michigan law *required* those payments. Second, as most employers recognized, from 1982 (when the 1981 Amendments went into effect) to the 1985 *Chambers* decision, that remained the State of Michigan law. As sophisticated business entities, petitioners surely knew there was a significant risk that their litigation position would be rejected and that they would owe full benefit payments; they doubtless took that risk into account in their planning. Third, as soon as *Chambers* was decided, the immediate legislative response told petitioners they could not assume *Chambers* would stand inviolable.

Most significantly, workers' compensation is a mandatory regulatory scheme, not one of unconstrained voluntary choice. Even *had* this legislation come as a complete surprise, it likely would not violate substantive due process principles. Because neither employers nor employees can choose to opt out of the workers' compensation system, petitioners could not have chosen a different course (short of ceasing to do business in Michigan) had the statutory changes been enacted earlier and made prospective. That petitioners might have left Michigan altogether, or restructured any significant business decisions, is simply implausible, given the relationship of the amount in dispute to their revenues and earnings. *Cf. Sperry*, 110 S. Ct. at 395-96; *Bradley v. Richmond School Bd.*, 416 U.S. 696, 721 (1974). Indeed, although petitioners vaguely invoke "reliance," the record does not identify

any specific decision that might have been altered at any time had petitioners known—as they did in fact throughout—that they might well have to pay full benefits to workers injured before 1982. The Michigan legislature's action involved no surprise at all, let alone one that could be considered unfair. Nor did it unfairly impose liabilities that could have been avoided had they been clearly defined sooner.

D. Destruction of Substantial Equity

Interference with interests resting on reasonable reliance may be necessary but is not sufficient to invalidate retroactive legislation. Not every reliance-based interest receives or warrants the same constitutional protection. Instead, the *nature* and quality of the interest burdened is relevant to the permissible scope of legislative action; when a statute affects interests in which individuals have a substantial stake, legislative interference becomes more vulnerable to challenge under the Due Process Clause. *Cf. Energy Reserves*, 459 U.S. at 412; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (special protection for "investment-backed" expectations under Just Compensation Clause). As a leading study puts it, "it is not unconstitutional to deprive a person of a right which rests on no substantial equity." Hochman, *supra*, at 722.

In this case, the only interests resting on substantial equity are those of the injured workers affected, including elderly retirees. Their lives had been structured around the well-justified expectation that, like all previously injured workers, they would regularly receive the benefit payments (often their principal income source) to which they had been found entitled at the time an award had been made. Employers cannot point to any similar substantial equity, or indeed any investment at all, that could reasonably have been based on Michigan law as it stood prior to the legislation at issue. With regard to the pre-*Chambers* period, they cannot reasonably have invested in reliance on a statute whose meaning was at best controversial and *sub judice*. And virtually as soon as

Chambers was decided, legislation to reverse it retroactively was introduced and approved in one legislative chamber.

E. State Self-Aggrandizement

Retroactive state action might be subject to special judicial scrutiny when the State itself directly benefits from its own retroactive policies. In such cases, States confront special incentives that might raise concerns as to whether full and fair attention will be given to the interests disadvantaged by retroactive policies. *Cf. United States Trust v. New Jersey*, 431 U.S. 1 (1976) (heightened scrutiny under Contracts Clause).[35] In the gift/estate tax cases, and in *Forbes*, where the Court invalidated retroactive statutes, the State stood to benefit in just this way. But that is not the case here. The Michigan legislature has simply reached one more accommodation in the ongoing conflict between two powerful interests—business and labor.

* * * *

In sum, judicial decisions interpreting regulatory statutes are a subset of the larger class of events that occasionally may produce unexpected, unsettling disturbances to a long established *status quo*. At least apart from actual final judgments, judicial interpretations of statutes pose no special barrier to a legislative determination to adopt a retroactive policy response. Such responses may be circumscribed by the Constitution in the presence of at least one of the special factors noted above. But because none is present here, the Michigan legislation falls well within acceptable constitutional boundaries.

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

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[35] The famous *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), and the Gold Clause cases, *Perry v. United States*, 294 U.S. 330 (1935) and *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), stand for the similar principle that repudiation of public (as opposed to private) obligations warrants heightened scrutiny.

Respectfully submitted,

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